FILED
MAY 28 1955
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1954

No. [redacted]106

WILLIAM LEIGHTON,
Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT FOR THE REVIEW AND VACATION OF THAT COURT'S ORDER OF FEBRUARY 10, 1955 DISMISSING A PETITION FOR THE REVIEW OF AN ORDER ENTERED JULY 8, 1954 BY THE SECURITIES AND EXCHANGE COMMISSION

WILLIAM LEIGHTON,
Petitioner *pro se,*
161 West 75th Street,
New York 23, N. Y.

INDEX

	PAGE
Statement as to Jurisdiction	1
Questions Presented	2
Statutes and Regulations Involved	3
Statement of the Case	7
Argument as to Certiorari Jurisdiction	9
Background of this Case	12
Argument on the Case	14
Prayer for Relief	17
Appendices:	
S.E.C. Order dated July 8, 1954	19
Order dated February 10, 1955 entered by U. S. Court of Appeals for the District of Columbia Circuit	21

Cases Cited

62 Cases of Jam v. *United States*, 340 U. S. 593, 596	1
Deckert v. *Independence Shares Corporation*, 311 U. S. 282	8, 17
F.C.C. v. *R.C.A. Communications, Inc.*, 346 U. S. 86	10
General Protective Committee etc. v. *S.E.C.*, 346 U. S. 521	11
In re Tucker Corporation, Sec. Act Release 3236 (1947)	13

PAGE

Oklahoma Texas Trust v. *S.E.C.*, 100 F. 2d 888 13

Phillips v. *S.E.C.*, 171 F. 2d 180, 182 9
Propper v. *Clark*, 337 U. S. 472, 484 10

S.E.C. v. *Bailey*, 41 F. Supp. 647 13
S.E.C. v. *W. J. Howey Co.*, 328 U. S. 293 11

United States v. *Brown*, 348 U. S. 110, 111 (1954)..... 17

Wilko v. *Swan*, 346 U. S. 427 (1953) 3, 8, 12
Williams v. *Clark*, 112 N. Y. S. 2d (1952) 13, 14

Statutes Cited

Securities Act of 1933, 48 Stat. 74 as amended, 15 U.S.C. Sections 77a-77aa:

Section 2(1) 2, 3, 4, 7, 11, 13, 15
Section 9(a) 1, 2, 4, 9, 12
Section 14 ..... 5, 12, 15
Section 19(a) 1, 2, 5, 8, 12, 15, 16
Section 20(a) 1, 2, 3, 5, 7, 8, 9, 10, 12, 14, 15, 16, 17
Section 20(b) 6

United States Statutes at Large, Admissibility in Evidence, 61 Stat. 633, 1 U.S.C. Section 112..... 3

Federal Deposit Insurance Act, 12 U.S.C. Title 16 14

Federal Reserve Act, Section 25(a), 12 U.S.C. Sections 611-631 13

National Stolen Property Act, 62 Stat. 805, 18 U.S.C. Section 2311 ..... 3, 16

Reorganization Plan No. 10 of 1950, 64 Stat. 1265 7, 9

17 Code of Federal Regulations:

Section 201.16 6
Section 202.4 6

Statement as to Jurisdiction

Section 9(a) of the Securities Act of 1933 as amended, 48 Stat. 74, 15 U.S.C. Section 77i, confers jurisdiction upon this honorable Court to review upon certiorari any judgment of the United States Court of Appeals for the District of Columbia Circuit respecting any order entered by the Securities and Exchange Commission (hereinafter referred to as the Commission).

Section 19(a) of the Securities Act equally subjects to rescission by a "judicial authority" any Rule or Regulation promulgated by the Commission pursuant to the power conferred upon it by said Section. It is submitted that where the Commission *rules* upon a Section 20(a) complaint, such as was submitted to it by your petitioner, such *ruling* is subject to rescission or amendment by a "judicial authority" in the same manner, or otherwise, as is the case with Commission *orders*. The latter being subject to judicial review as provided by Section 9(a) and as sought below by your petitioner, it is obvious that the former have no lesser status for the purpose of such review.

In case of doubt, this Court has stated its "task to construe what Congress has written. After all, Congress expresses its purpose by words. It is for us to ascertain, neither to add, nor subtract, neither to delete, nor distort", *62 Cases of Jam* v. *United States*, 340 U. S. 593, 596.

Whether the Commission's *ruling* upon your petitioner's Section 20(a) complaint is not substantially an *order* subject to judicial review pursuant to Sections 9(a) or 19(a) is the question upon which turns this Court's jurisdiction upon certiorari.

On February 10, 1955 and after oral argument, the United States Court of Appeals for the District of Columbia Circuit granted the Commission's motion to dismiss

your petitioner's petition for the review by that court of the Commission's *ruling* dated July 8, 1954. It is therefore submitted that the instant petition for certiorari to the court below seeks the proper exercise of this Court's jurisdiction pursuant to the statutes cited.

Questions Presented

1. Whether the Securities and Exchange Commission has exclusive primary jurisdiction for the enforcement of the Securities Act of 1933 and whether such jurisdiction is discretionary or mandatory when sought by means of a Section 20(a) complaint alleging violations of the Act by the issuer of unregistered securities.

2. Whether the Commission's *ruling* on a Section 20(a) complaint holding the alleged security not to be a Section 2(1) *security* is *neither* rule making by the Commission pursuant to Section 19(a) and hence subject to judicial amendment or rescission as provided by the same Section *nor* substantially an *order* subject to judicial review pursuant to Section 9(a).

3. Whether the applicability of the Securities Act of 1933 to American Express Travelers Checks, which are instruments sold or offered for sale in interstate commerce and through the mails, is not dependent upon a determination that such instruments are Section 2(1) securities and whether the Commission has exclusive primary jurisdiction for making such determination when sought by means of a Section 20(a) complaint.

4. Whether the effect of exempting from judicial review the Commission's ruling upon a Section 20(a) complaint is not to vest the Commission with "final authority to declare the meaning of legislation", here with authority to finally decide whether American Express Company Travelers Checks are Section 2(1) securities, although

such instruments are "commonly known" as securities by reason of their so being defined by the National Stolen Property Act, 18 U.S.C. Section 2311, a Federal statute "commonly known to everyone".

5. Whether "any person having acquired any security", such as a person having acquired American Express Company travelers checks in foreign commerce, is not "such person" as is entitled, pursuant to Section 20(a) of the Act, to file a complaint with the Commission and whether such person can *waive* this right, and the rights to judicial review, despite Section 14 of the Act as construed by this Court in *Wilko* v. *Swan,* 346 U. S. 427 (1953).

Statutes and Regulations Involved

United States Statutes at Large, Admissibility in evidence, 61 Stat. 633 as amended:

1 U.S.C. Section 112: * * * The United States Statutes at Large *shall be legal evidence of the laws,* concurrent resolutions, treaties, international agreements other than treaties, proclamations by the President, and proposed or ratified amendments to the Constitution of the United States, *in all courts of the United States,* the several States and the Territories and insular possessions of the United States.

National Stolen Property Act, 18 U.S.C. Sec. 2311:

As used in this chapter * * *

"Securities" includes any *note,* stock certificate, *bond, debenture,* check, draft, warrant, traveler's check, letter of credit, warehouse receipt, negotiable bill of lading, *evidence of indebtedness, certificate of interest or participation in a profit-sharing agreement, collateral trust certificate, preorganization certificate or subscription, transfer-*

able shares, investment contract, voting-trust certificate; • • • or in general any instrument commonly known as a security, or any certificate or interest or participation in, temporary or interim certificate for, receipt for, warrant or right to subscribe and or purchase any of the foregoing or any forged, counterfeited or spurious representation of any of the foregoing.

Securities Act of 1933, 48 Stat. 74, 15 U.S.C. Sections 77a-77aa:

Section 2(1). When used in this title, unless the context otherwise requires—

(1) the term "security" means any *note,* stock treasury stock, *bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate,* certificate of deposit for a security, fractional undivided interest in oil, gas or other mineral rights, or, *in general,* any interest or *instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.* (Italicized definitions correspond to those of the National Stolen Property Act).

Court Review of Orders:

Section 9(a): Any person aggrieved by an *order* of the Commission may obtain a review of such order in the Circuit Court of Appeals of the United States, within such circuit wherein such person resides or has his principal place of business, or in the Court of Appeals of the District of Columbia, by filing in such court within sixty days

after the entry of such order, a written petition praying that the order of the Commission be modified or be set aside in whole or in part. A copy of such petition shall be *forthwith* served upon the Commission, and *thereupon* the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission.

Contrary Stipulations Void:

Section 14. Any condition, stipulation, or provision binding *any person acquiring any security to waive compliance with any provision* of this title or of the rules and regulations of the Commission shall be void.

Special Powers of Commission:

Section 19(a): The Commission shall have authority from time to time to *make, amend, and rescind such rules and regulations* as may be necessary to carry out the provisions of this title, including rules and regulations governing registration statements and prospectuses for various classes of securities and issuers, and defining accounting, technical and trade terms used in this title. • • • No provision of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule or regulation of the Commission, notwithstanding that *such rule or regulation may,* after such act or omission, be amended or rescinded or *be determined by judicial* or other *authority to be invalid for any reason.*

Injunctions and Prosecutions of Offenses:

Section 20. (a) Whenever it shall appear to the Commission, either upon complaint or otherwise, that the pro-

visions of this title, or of any rule or regulation prescribed under authority thereof, have been or are about to be violated, it *may, in its discretion, either require or permit such person* to file with it a statement in writing under oath, or otherwise, as to all the facts and circumstances concerning the subject matter which it believes to be in the public interest to investigate, and may investigate such facts.

(b) Whenever it shall appear to the Commission that any person is engaged or about to engage *in any acts or practices which constitute or* will constitute a violation of the provisions of this title, or of any rule or regulation prescribed under authority thereof, it may in its discretion, bring an action in any district court of the United States, United States court of any Territory, or the Supreme Court of the District of Columbia *to enjoin such acts or practices,* • • •

17 C.F.R. Section 201.16: Signature of Commission orders; service of Commission rulings.

(a) All orders of the Commission shall be signed by the Secretary or such other person as may be authorized by the Commission.

Section 202.4: Enforcement activities.

(a) Where, *from complaints received from members of the public,* communications from Federal or State agencies, examination and filings made with the Commission, or otherwise, it appears that there may be violation of the acts administered by the Commission, or the rules and regulations thereunder, *a preliminary investigation is generally made.* In such preliminary investigation, no process is issued or testimony compelled.

Reorganization Plan No. 10 of 1950, 64 Stat. 1265:

Section 1. Transfer of functions to the Chairman.

(a) Subject to the provisions of subsection (b), of this section there are hereby transferred from the Securities and Exchange Commission, hereinafter referred to as the Commission, to the Chairman of the Commission, hereinafter referred to as the Chairman, the *executive and administrative* functions of the Commission with respect to (1) the appointment and supervision of personnel under the Commission, (2) the distribution of business among such personnel and among administrative units of the Commission and (3) the use and expenditure of funds.
• • •

Statement of the Case

Upon the refusal of the American Express Company to redeem $250 in travelers checks submitted for redemption in foreign commerce by your petitioner, a statutory complaint (Tr. 5-11) was submitted to the S.E.C. pursuant to Section 20(a) of the Securities Act of 1933, 48 Stat. 86 as amended, 15 U.S.C. Section 77t. Where an instrument is sold or offered for sale in interstate commerce and through the mails and such instrument is a nonexempt Section 2(1) security, the Section 7 registration statement respecting such security must state the character of its amortization provisions, Schedule A(12).

The amortization provisions respecting travelers checks have been, and are being, continuously advertised by the American Express Company as follows: "instantly accepted, with no questions asked" (Tr. 7). Therefore, the failure of American Express to redeem the travelers checks upon demand raised the following questions:

(a) whether such travelers checks are Section 2(1) "securities"; if so, any of the recovery provisions of the

Act would apply but cannot be waived, *Wilko* v. *Swan, supra.*

(b) whether the advertisements offering such checks for sale and assuring acceptors of redemption "with no questions asked" were not, in effect, Section 2(10) "prospectuses" and as such, should not contain the same statements which would be includible in a registration statement pursuant to Section 10(a). Following this Court's holding in *Deckert* v. *Independent Shares Corporation*, 311 U. S. 282, to the effect that "Section 12(2) states the legal consequences of conduct proscribed by the Act; it does not purport to state the form of action or procedure the claimant is to employ. * * * (The) power to make the right of recovery effective implies the power to utilize any of the procedures or actions normally available to the litigant according to the exigencies of the particular case", a complaint alleging violation of the Act by American Express was filed with the Commission pursuant to Section 20(a), since the amortization provisions of the Section 2(10) prospectuses (magazine and newspaper advertisements) were blandly ignored by the issuer.

Ruling that no *security* appeared to it to be involved, the Commission dismissed the complaint on July 8, 1954, holding further that "Section 20(a) does not establish a formal complaint procedure" nor that "a letter stating a complaint is a *complaint* under Section 20(a)", Tr. 25.

Since the Commission had not adopted a Rule as to the procedure it proposed to follow for the effectuation of the Section 20 provisions, it appeared to your petitioner that the Commission's disposition of the complaint constituted rule-making by the Commission on three points of law, such rule-making being subject to judicial rescission or amendment in accordance with Section 19(a) of the Act, the very Section conferring authority upon the Commis-

sion for such rule-making. Alternatively, treating the Commission's disposition as an "order" consistent with the holding of *Phillips* v. *S.E.C.*, 171 F. 2d, 180, 182, review was sought in the United States Court of Appeals for the District of Columbia Circuit. The Commission's disposition of the Section 20(a) complaint was not made in accordance with the Commission's own regulations, 17 C.F.R. 202.4 which requires a preliminary investigation of complaints received from members of the "public", presumably the statutory "person(s)" referred to in Section 20(a) of the Act. Nor was the complaint disposed of in accordance with Section 1 of Reorganization Plan No. 10 of 1950, 64 Stat. 1265, despite a request (Tr. 26) for a formal disposition in behalf of the Commission.

After oral argument at your petitioner's request, the United States Court of Appeals for the District of Columbia Circuit, on February 10, 1955, dismissed a petition for the review of the Commission's disposition of the statutory complaint, holding that such disposition was not a Commission "order", and that, in any event, the Commission had "discretion" to enter the disposition as it saw fit. Review below was not sought until all the objections to the Commission's holdings of law had been brought before the Commission as required by Section 9(a) of the Act.

Argument as to Certiorari Jurisdiction

The exercise of certiorari jurisdiction by this Court is governed by Rule 19 of this Court's Rules, which requires a showing, among others that:

The Court of Appeals below has decided an important question of federal law which has not been, but should be, settled by this Court; or that the federal question has been decided in a way in conflict with applicable decisions of this Court.

In committing the enforcement of the Securities Act of 1933 to the untrammeled discretion of the S.E.C., the court below disregarded the principles of *F.C.C.* v. *R.C.A. Communications, Inc.*, 346 U. S. 86, 91, 92, where in clear and unmistakable language, this Court held, *inter alia*, that: "Congress did not purport to transfer its legislative power to the unbounded discretion of the regulatory body. • • • Congress has charged the courts with the responsibility of saying whether the Commission has fairly exercised its discretion within the vagueish, penumbral bounds expressed by the concept of 'public interest'. • • • It is our responsibility to say whether the Commission has been guided by proper considerations in bringing the deposit of its experience, the disciplined feel of the expert, to bear on applications for licenses in the public interest."

The Securities and Exchange Commission's status under the Securities Act of 1933 is neither senior nor junior to that of the Federal Communications Commission under the Federal Communications Act of 1934. It is therefore for this Court to "finally declare the meaning of legislation", *Propper* v. *Clark*, 337 U. S. 472, 484, by ruling whether or not, in disposing of your petitioner's statutory complaint brought under Section 20(a) of the Act, the Commission is bound by such principles as control the exercise of the F.C.C.'s discretion in the disposition of applications for radio licenses, *R.C.A. Communications, supra.* Like the disposition of an application for a license under the Federal Communications Act, the disposition of a complaint under the Securities Act is governed by standards of "public interest". Since this Court had held that such standards should be ultimately set and reviewed by the courts, it is clear that the court below adhered to its own *R.C.A. Communications* theory in the case at bar, even though such theory had been vacated by this Court. This, the court below did in spite of the fact that this Court

specifically reviewed the exercise of the S.E.C.'s discretion in a proceeding under the Public Utility Holding Company Act, *General Protective Committee* v. *S.E.C.*, 346 U. S. 521, 534, stating: "We cannot say that the Commission has abused its *discretion* in the present case * * *".

The second important question which, consistent with Rule 19, is for this Court to be decided, is whether the S.E.C. is under a mandatory or discretionary duty to enforce the Securities Act of 1933. The Commission's briefs to the court below express uncertainty as to the law in this respect. Thus, it stated that: "The Commission, of course, has enforcement functions under the statutes it administers. This does not mean, however, that the Commission, rather than the courts, must necessarily render initial interpretative rulings". "Moreover, there is no requirement, such as petitioner suggests, that the Commission, rather than the courts, render initial decisions under the federal securities statutes".

The S.E.C. thus seeks to create an undefined system of co-responsibility with the courts for the enforcement of the Securities Act but leaves it open to considerable doubt just how this system should work, whether by joint or parallel action with regard to the instrument alleged to be a "security". For, the Securities Act of 1933 cannot be enforced as to any instrument unless there is a determination that such instrument is a Section 2(1) security. "An affirmative answer brings into operation the registration requirements of Section 5(a) unless the security is granted an exemption under Section 3(b)", *S.E.C.* v. *W. J. Howey Co.*, 328 U. S. 293. The Commission seems to intimate that the courts, rather than it, should assume the delicate task of deciding, 22 years after the enactment of the Act, whether American Express Company travelers checks are Section 2(1) securities, but not in a proceeding which

reviews its order or rescinds its ruling whereby this question was decided in the negative.

This Court's Rule 19 further contemplates the grant of certiorari where the court below has decided a federal question in conflict with an applicable decision of this Court. *Wilko* v. *Swan,* 346 U. S. 427 (1953) confirmed the command of Section 14 of the Securities Act of 1933 whereby no "person acquiring any security" can waive any of the provisions of the Act. Plainly, the Section 20(a) complaint is a *provision* of the Act which the Commission wants your petitioner to waive or forfeit, and Sections 9(a) or 19(a) are the review *provisions* thereof, which the Court of Appeals failed to recognize as such. Had your petitioner failed to seek review of the Commission's disposition of his statutory complaint, there would have been a case of "waiving" statutory review provisions, and a bar to further proceedings for recovery. Similarly, your petitioner's failure to seek certiorari here consistent with Section 9(a) would constitute a further "waiver" of a statutory provision. It is therefore for this Court to decide whether certiorari here, review below and complaint before the Commission are waivable or nonwaivable *provisions* of the Act.

The Background of This Case

To put this case in its proper perspective, it is essential to recite the reasons for the original complaint brought before the Commission.

American Express Company, the issuer of the travelers checks, is an unincorporated association organized under the common law of the State of New York. Whilst its objectives include the promotion of travel abroad, its interest is concentrated on the issuance of travelers checks, which are advertised in interstate commerce and through the mails as being "instantly accepted, with no questions

asked". As of December 31, 1953, there were $246½ million worth of travelers checks issued in interstate and foreign commerce and through banks, members of the Federal Reserve System and the Federal Deposit Insurance Corporation. In interpreting the common law of the State of New York with respect to such travelers checks, the courts of the State of New York have held that "the purchaser (of travelers checks) opens an account with their issuer much in the same manner as one would open an account with a bank and the transaction is essentially a deposit and not a loan", *Williams* v. *Clark*, 112 N. Y. S. 2d (1952). That court held such travelers checks to be "certificates of deposits of money". Upon inquiry, the Federal Deposit Insurance Corporation advised that American Express Company is not a bank, hence its travelers checks are uninsurable and uninsured under the Federal Deposit Insurance Act, Tr. 16.

On the other hand, obligations to pay money, such as these travelers checks, have been held by Federal courts to be evidences of indebtedness for the purpose of Section 2(1) of the Securities Act of 1933, *S.E.C.* v. *Bailey*, 41 F. Supp. 647, 650, accord, *Oklahoma Texas Trust* v. *S.E.C.*, 100 F. 2d 888. This point was amply elaborated in the statutory complaint before the Commission, Tr. 5, 16. The Commission itself had ruled that where an instrument provides for the repayment of the deposit received therefor, such instrument is a Section 2(1) security, *In re Tucker Corporation*, Sec. Act Release 3236 (1947).

The foreign banking business of American Express is done through its wholly-owned subsidiary, The American Express Company, Inc. Although Section 25(a) of the Federal Reserve Act, 12 U.S.C. Sections 611-631, requires all corporations engaged in the foreign banking business to organize themselves under that Section and to obtain a permit to engage in such business from the Board of

Governors of the Federal Reserve System, neither American Express Company, nor The American Express Company, Inc. have been so organized and so licensed, Tr. 20.

A corporation engaged in the foreign banking business is expressly prohibited by Section 25(a) of the Federal Reserve Act from accepting money deposits in the United States without the prior consent of the Board of Governors of the Federal Reserve System. The Board's consent for the acceptance of such deposits, *i.e.* for the sale of travelers checks, by American Express was never sought nor obtained. In other words, American Express Company unlawfully accepts money deposits within the United States whilst being unlawfully engaged in the foreign banking business directly and through its wholly owned subsidiary.

Since the issuance of uninsured travelers checks constitutes a sale of "certificates of deposits of money", *Williams* v. *Clark, supra,* the receipt of deposits therefor at any teller's station of a Federally insured bank is forbidden by the valid regulations promulgated under the Federal Deposit Insurance Act, 12 C.F.R. 328.1(c). Yet, because of ignorance as to the real status of American Express, thousands of Federally insured banks accept at their tellers' stations deposits of money on which they are not primarily liable but in exchange for which they issue not their own deposit receipts but uninsurable and uninsured "certificates of deposit of money" known as American Express travelers checks.

Argument on the Case

With this background of reckless illegality, the Commission was requested, by means of a Section 20(a) complaint, to investigate the violations of the Securities Act by this issuer of unregistered securities, and 17 C.F.R. 202.4 was the Commission's authority to proceed in that direc-

tion. The failure of American Express to comply with the above quoted statutes is pertinent to a Section 20(a) proceeding to the extent that it eliminates any possible exemption under Sections 3 or 4 of the Act.

It was for the Commission to decide upon the availability of an exemption under the Securities Act if its purpose was to avoid entering the field of supervising what are essentially interstate banking activities of institutions that are not banks. However, the Commission took a shortcut to this end. It asserted, in briefs addressed to the court below as well as in its own decision of July 8, 1954, that its decision to the effect that American Express travelers checks are not Section 2(1) securities is a matter for its own "discretion" since it was taken in Section 20(a) proceedings, which are alleged as not subject to judicial review. Unless "final authority to declare the meaning of legislation" is vested in the Commission, it is for the courts to declare the extent of the Commission's discretion under Section 20(a). The Court of Appeals avoided a declaration of the meaning of Section 20(a) by holding that the Commission's disposition of July 8, 1954 was not an "order" subject to its review under Section 9(a).

But, in providing for a "complaint" to be filed with the Commission by "such person", *i.e.* "any person having acquired any security", Section 14, Congress created no less a remedy than is provided by Rule 3 of the Federal Rules of Civil Procedure whereby a complaint is the one form of action recognizable under those Rules. If the latter is disposable only by *order* of the Federal court wherein it was filed, would it be too much to expect the Commission to similarly dispose of statutory complaints alleging violations of the Securities Act? On the other hand, rule-making by the Commission is subject to judicial rescission or amendment pursuant to Section 19(a). The

Commission's decision of July 8, 1954, in effect, *ruled* on the following points of law:

> (a) that American Express Company travelers checks are not "evidences of indebtedness", and hence not "securities" for the purpose of Section 2(1) of the Securities Act, these instruments not appearing to the Commission to be "securities" (Tr. 5, 12, 25).
>
> (b) that notwithstanding the fact that the National Stolen Property Act, 18 U.S.C. Section 2311 specifically defines "securities" as including travelers checks, this commonly known definition would not affect the Commission's holding.
>
> (c) that Section 20(a) does not establish a formal complaint procedure, but that it confers "complete discretion" on the Commission (reply brief below, page 3).

Of course, the Commission has ample authority under Section 19(a) to *rule* on, and promulgate regulations as to the meaning of, Section 20(a). But so far, the Commission has failed to adopt a Rule in this respect. To assume, as the Commission does, that its decision of July 8, 1954 is not rule-making pursuant to Section 19(a) but is the exercise of discretion not subject to judicial review, is to assume that the Commission's powers under Section 20(a) exceed its powers under Section 19(a), the latter having a greater impact on the administration of the securities laws than the former.

Finally, the Commission asserts that "many other procedures" are available for the redress of your petitioner's grievance, anything else but a Section 20(a) complaint. Assuming, *arguendo*, that the Commission has in mind Sections 12 and 17 of the Securities Act, it is well to

recall this Court's holding in *Deckert* v. *Independence Shares Corporation,* 311 U. S. 282, *supra.* In that case, this Court refused to recognize a doctrine of election of remedies where Congress had not prescribed it, and a recent decision by this Court has adhered to this theory, cf. *United States* v. *Brown,* 348 U. S. 110, 111. Therefore, it is not for the Commission to have your petitioner elect the remedy provided by Sections 12 and 17 by waiving the remedy provided by Section 20(a). If any *violation* of the Securities Act can be established in proceedings under the former sections, then, clearly, those violations are *res judicata* for the purpose of the latter section, and conversely. "Any person having acquired any security" cannot waive any of these remedies, and your petitioner merely availed himself of the one remedy which appeared to be less involved, at least at the time it was elected, but not as a waiver of other remedies.

Prayer for Relief

It is respectfully prayed that the Order dated February 10, 1955 entered by the court below be vacated and the case be remanded to the Commission with directions that it affirmatively exercise its jurisdiction consistent with the holding that American Express Company travelers checks are "securities" for the purpose of Section 2(1) of the Securities Act of 1933 as amended.

Respectfully submitted,

WILLIAM LEIGHTON,
Petitioner *pro se.*

Appendix

SECURITIES AND EXCHANGE COMMISSION
Washington 25, D. C.

July 8, 1954

Division of
Corporation Finance

Mr. William Leighton
9 Rue Mansart
Paris 9e, France

Dear Sir:

This refers to your letters of March 13 and 20, May 15, and June 17, 1954, in further reference to the application of the Securities Act of 1933 to the issuance of travelers checks by American Express Company.

As you were advised in my letter of December 7, 1953, supplemented by my letters of February 17 and 19, 1954, travelers checks do not appear to be securities within the meaning of the definition of "security" in Section 2(1) of the Securities Act. Definitions of "security" contained in other statutes would not change this result. Accordingly, I can only repeat that the Act does not appear to provide any remedy for the matter of which you complain.

In your letter of May 15, you request to be advised of the status of the proceedings which the Commission "might have instituted" under Section 20(a) after your complaint. Inasmuch as no security appears to be involved, the Commission would be without jurisdiction to institute an investigation such as you request. Your letter indicates your understanding that a letter stating a complaint does not require the automatic institution of an investigation under Section 20(a). Further, Section 20(a)

does not provide that a letter stating a complaint shall be disposed of only by formal order of the Commission, nor that such a letter is a "complaint under Section 20(a)." The section is one granting certain authority to the Commission and not one establishing a formal complaint procedure.

I can appreciate your feelings in this matter and can understand that you would like to be able to recover your funds and prevent similar occurrences in the future. However, the Commission is necessarily bound by the limits of its jurisdiction, and compliance with your request would appear to exceed such jurisdiction.

Very truly yours,

signed—GERALD J. O'LEARY
Gerald J. O'Leary
Assistant Director
Division of Corporation Finance

Appendix

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12404

WILLIAM LEIGHTON, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION, RESPONDENT

On motion to dismiss petition for review
for lack of jurisdiction

Decided February 10, 1955

Mr. William Leighton, petitioner *pro se.*

Mr. William H. Timbers, General Counsel, Securities and Exchange Commission, with whom *Mr. Alexander Cohen,* Special Counsel, Securities and Exchange Commission, was on the brief, for respondent.

Before EDGERTON, BAZELON and FAHY, Circuit Judges.

PER CURIAM: William Leighton, the petitioner, sought to persuade the Securities and Exchange Commission to assume jurisdiction to investigate and regulate the issuance and sale by the American Express Company of travelers checks, contending they are securities within the meaning of the Securities Act of 1933.[1] The Commission refused. Leighton then petitioned this court

[1] 48 Stat. 74 *et seq.*, as amended, 15 U.S.C. § 77a *et seq.* (1952).

to review the Commission's refusal, contending jurisdiction resides in this court under Section 9(a) of the Securities Act[2] and Section 10 of the Administrative Procedure Act.[3] The Commission has moved that we dismiss the petition for lack of jurisdiction.

Were we to assume that the action of the Commission in declining to entertain petitioner's complaint, or to investigate the matters pressed by him, constituted an order of the Commission nevertheless it would be one within the discretion of the Commission under Section 20 of the Securities Act[4] and, in any event, not such an order as would be reviewable by this court under Section 9(a) of the Act. See *Crooker* v. *Securities and Exchange Commission*, 161 F. 2d 944, 949 (1st Cir.). The discretionary character of the Commission's action likewise removes it from Section 10 of the Administrative Procedure Act, which excepts from its provisions for judicial review agency action committed by law to agency discretion. The motion to dismiss accordingly will be granted.

It is so ordered.

---

[2] 48 Stat. 80, as amended, 15 U.S.C. § 77i (1952).
[3] 60 Stat. 237, 243, as amended, 5 U.S.C. § 1009 (1952).
[4] 48 Stat. 86, as amended, 15 U.S.C. § 77t (1952).

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutory provisions involved	2
Statement	3
Argument	5
Conclusion	9

CITATIONS

Cases:

Berlinsky v. *Woods*, 178 F. 2d 265	6
Crooker v. *S. E. C.*, 161 F. 2d 944	5, 6
F. C. C. v. *R. C. A. Communications, Inc.*, 346 U. S. 86	8
Federal Power Commission v. *Metropolitan Edison Co.*, 304 U. S. 375	8
General Drivers, etc. v. *N. L. R. B.*, 179 F. 2d 492	5
General Protective Committee, etc. v. *S. E. C.*, 346 U. S. 521	8
Jacobsen v. *N. L. R. B.*, 120 F. 2d 96	5-6
Laundry Workers International Union, Local 221 v. *N. L. R. B.*, 197 F. 2d 701	8
Louisiana v. *McAdoo*, 234 U. S. 627	5
S. E. C. v. *W. J. Howey Co.*, 328 U. S. 293	7
S. E. C. v. *C. M. Joiner Leasing Corp.*, 320 U. S. 344	7
Third Avenue Ry. v. *S. E. C.*, 85 F. 2d 914	6

Statutes and Regulations:

Federal Power Act (49 Stat. 860), Sec. 313(b), 16 U.S.C. 825*l*	7
National Labor Relations Act, Sec. 10(f) (49 Stat. 455), 29 U.S.C. 160(f)	8
National Stolen Property Act (62 Stat. 805), 18 U.S.C. 2311 *et seq.*	7

Statutes and Regulations—Continued

	Page
Securities Act of 1933:	
Sec. 2(1), 15 U.S.C. 77b(1)	7
Sec. 9(a), 15 U.S.C. 77i(a)	3, 7
Sec. 20, 15 U.S.C. 77t	2, 6
Securities Exchange Act of 1934 (48 Stat. 901, as amended), Sec. 25(a), 15 U.S.C. 78y(a)	6
Code of Federal Regulations: 17 C.F.R. 202.4	7

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 106

WILLIAM LEIGHTON, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the Court of Appeals (Pet. 21-22) is reported at 221 F. 2d 91.

JURISDICTION

The order of the Court of Appeals dismissing the petition for review was entered on February 10, 1955. On May 11, 1955, petitioner obtained an order extending until June 1, 1955, the time for filing his petition for a writ of certiorari. The

petition was filed on May 28, 1955. Jurisdiction may be rested upon 28 U.S.C. 1254.

QUESTION PRESENTED

Whether the refusal of the Securities and Exchange Commission to accede to the request of petitioner that it institute an investigation and seek an injunction for alleged violations of the Securities Act of 1933 is subject to judicial review.

STATUTORY PROVISIONS INVOLVED

Section 20 of the Securities Act of 1933, 15 U.S.C. 77t, provides:

> (a) Whenever it shall appear to the Commission, either upon complaint or otherwise, that the provisions of this title, * * * have been or are about to be violated, it may, in its discretion, either require or permit such person to file with it a statement in writing, under oath, or otherwise, as to all the facts and circumstances concerning the subject matter which it believes to be in the public interest to investigate, and may investigate such facts.
>
> (b) Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this title, * * * it may in its discretion, bring an action in any district court of the United States, United States court of

> any Territory, or the United States District Court for the District of Columbia to enjoin such acts or practices, * * *.

Section 9(a) of the Securities Act of 1933, 15 U.S.C. 77i(a), provides:

> Any person aggrieved by an order of the Commission may obtain a review of such order in the Court of Appeals of the United States, within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or be set aside in whole or in part. * * *

STATEMENT

The petition for review in the court below was filed after extended trans-Atlantic correspondence between petitioner, who resided in Paris, France, and the Commission's staff. The Commission "order", which petitioner sought to have the Court of Appeals review, was one of a number of letters written by an assistant director of the Commission's Division of Corporation Finance in the course of that correspondence (Tr. 1-25).[1] The particular letter, dated July 8, 1954 (Tr. 25), is set forth in pages 19-20 of the petition for cer-

[1] "Tr." refers to the transcript filed with the court below with the pagination there used. See p. 4, *infra*. A certified copy of said transcript has been filed with this Court.

tiorari. Pursuant to an order of the court below, a copy of the entire correspondence was certified and filed in the Court of Appeals as a "transcript of the record in this case". In said certification, however, the Commission reserved its position—with which the Court of Appeals later agreed—that it had entered no "order" in this matter with respect to which a record might be certified within the contemplation of the court review provisions of the Securities Act of 1933.

The petitioner had attempted to obtain a Commission interpretation that travelers checks issued by the American Express Company are "securities" subject to the Securities Act of 1933. He had also sought, unsuccessfully too, to have the Commission take action to compel the American Express Company to adhere to the various requirements of that Act in the issuance and sale of those checks, and to honor certain checks amounting to $250 which he had cashed but on which payment had been refused because the checks had been reported lost or stolen.

The Assistant Director stated in his letter of July 8, 1952 (Tr. 25), that the travelers checks did not appear to be "securities" within the purview of the Securities Act of 1933. He advised petitioner that Section 20(a) of the Securities Act did not require the Commission to institute investigatory proceedings upon petitioner's complaint, and that the Commission had no jurisdiction in the matter since no security appeared to be involved. He advised, further, that Section 20(a)

established no formal complaint procedure, that it did not require the entry of any order upon petitioner's complaint, and that it was merely a grant of authority to the Commission to take action. On September 3, 1954, petitioner filed a petition for review in the Court of Appeals for the District of Columbia Circuit in which he sought to have that court "reverse and set aside the SEC action of July 8, 1954" (p. 7), and compel the Commission to take action on his complaint consistent with his view of the statute (p. 8). The Commission moved to dismiss the petition for review for lack of jurisdiction. On February 10, 1955, the Court of Appeals handed down its *per curiam* opinion granting the Commission's motion to dismiss.

ARGUMENT

There is no reason for the grant of a writ of certiorari. No substantial question is presented. There is no conflict in the decisions. The ruling below is obviously correct, and is in accord with the holdings of this Court and other Courts of Appeals.

It is well established that the failure of an administrator or administrative body, in the exercise of administrative discretion, to institute proceedings or to take other action requested by a complainant in a particular case is not a matter for review by the courts. See, *e.g.*, *Louisiana* v. *McAdoo*, 234 U. S. 627; *Crooker* v. *S. E. C.*, 161 F. 2d 944 (C.A. 1); *General Drivers, etc.* v. *N. L. R. B.*, 179 F. 2d 492 (C.A. 10); *Jacobsen*

v. *N. L. R. B.*, 120 F. 2d 96 (C.A. 3); *Berlinsky* v. *Woods*, 178 F. 2d 265 (C.A. 4); *Third Avenue Ry.* v. *S. E. C.*, 85 F. 2d 914 (C.A. 2). We are not aware of any holdings to the contrary.

In *Crooker* v. *S. E. C.*, 161 F. 2d 944, cited in the opinion below, the Court of Appeals for the First Circuit held that it had no jurisdiction to require the Commission to institute "stop order" proceedings to suspend the effectiveness of a registration statement. The court observed also that it was "without power to direct the Commission, at the instance of a private petitioner, to make an investigation under § 20(a) or to institute injunction proceedings under § 20(b)." 161 F. 2d, at 949.[2]

Section 20 of the Securities Act of 1933, *supra*, pp. 2-3, expressly makes it wholly discretionary with the Commission whether to conduct an investigation or institute enforcement proceedings on a complaint charging violation of the statute. It gives the Commission such discretion "[w]henever it shall appear to the Commission" that the Act has been or may be violated.[3] The statute

---

[2] Cf. *Third Avenue Railway* v. *S. E. C.*, 85 F. 2d 914 (C.A. 2), holding that the similar court review provisions of Section 25(a) of the Securities Exchange Act of 1934, 48 Stat. 901, as amended, 15 U.S.C., § 78y(a), did not vest the court with jurisdiction to review a letter notifying petitioner that the Commission had denied its request for a certain amendment to the Commission's Form 10-K relating to annual reports of corporations.

[3] Contrary to petitioner's statement (Pet. 9), the Commission has no rule or regulation which requires it to make a preliminary investigation upon every complaint received from

does not contemplate the holding of a hearing, or the entry of an "order", upon a complaint. In the present case, petitioner was simply advised by letter that the Commission did not consider the transactions complained of to be within the purview of the Act.[4]

The Securities Act affords no right to judicial review of the Commission's action or non-action in this area. Section 9(a) provides only for court review on application of a person "aggrieved" by a Commission "order" in a statutory proceeding of a quasi-judicial nature. This section is similar to Section 313(b) of the Federal Power Act, 49 Stat. 860, 16 U.S.C. 825*l*, which

---

a member of the public. The description in the Code of Federal Regulations of the Commission's informal and other procedures (17 C.F.R., Part 202), to which petitioner refers, states only that preliminary investigations generally are made where it appears to the Commission that "there may be violation" of a statute which the Commission administers (17 C.F.R. 202.4).

[4] The purpose and scope of the National Stolen Property Act (62 Stat. 805, 18 U.S.C. 2311, *et seq.*), cited by petitioner at page 16 of his petition, of course, differs materially from the Securities Act of 1933. Documents such as personal checks, drafts, letters of credit, bills of lading, and writings evidencing ownership of goods, wares, and merchandise, as well as travelers checks—none of which are mentioned in the Securities Act definition [Section 2(1), 15 U.S.C. 77b(1)]—are expressly defined to be "securities" for purposes of the National Stolen Property Act. 18 U.S.C. 2311. Whatever treatment may be given travelers checks under other statutes, such checks, in themselves, are essentially media of exchange, and do not involve business investments such as the Securities Act was designed to cover. See *S. E. C.* v. *C. M. Joiner Leasing Corp.*, 320 U.S. 344; *S. E. C.* v. *W. J. Howey Co.*, 328 U.S. 293. None of the cases cited by petitioner (Pet. 13) involved travelers checks or documents of similar character.

this Court described as relating "to orders of a definitive character dealing with the merits of a proceeding before the Commission and resulting from a hearing upon evidence and supported by findings appropriate to the case." *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U.S. 375, 384.[5] There has been no proceeding here involving an order entered upon a record developed from evidence taken in a hearing before the Commission. Nor is such a proceeding contemplated by the statute in situations where complaints are submitted to the Commission.

Neither *General Protective Committee, etc.* v. *S. E. C.*, 346 U.S. 521, nor *F. C. C.* v. *R. C. A. Communications, Inc.*, 346 U.S. 86, cited by petitioner, is relevant here since both involved formal orders made on the basis of hearings as contemplated by the statutes involved.

The decision below, of course, does not prevent petitioner from instituting action under the private civil remedies provisions of the Securities Act on whatever cause of action he believes he may possess against the American Express Company for violations of that Act. There is no requirement that one who claims to have been injured by a violation of the statute must "elect" between making a complaint to the Commission and instituting a private action of his own.

---

[5] To the same effect, construing the court review provisions of Section 10(f) of the National Labor Relations Act, 49 Stat. 455, 29 U.S.C. 160(f), see *Laundry Workers International Union, Local 221* v. *N. L. R. B.*, 197 F. 2d 701, 703-704 (C.A. 5).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SIMON E. SOBELOFF,
Solicitor General.

WILLIAM H. TIMBERS,
General Counsel,
ALEXANDER COHEN,
Special Counsel,
Securities and Exchange Commission.
JUNE 1955

☆ U. S. GOVERNMENT PRINTING OFFICE: 1955 947045 1955

FILED
NOV 3 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 106

WILLIAM LEIGHTON,
Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

PETITION FOR THE REHEARING OF THE ORDER OF OCTOBER 10, 1955 DENYING THE ISSUANCE OF A WRIT OF CERTIORARI, AND FOR A STAY OF PROCEEDINGS

WILLIAM LEIGHTON,
Petitioner *pro se,*
43 West 74th Street,
New York 23, N. Y.

INDEX

Statutes Cited

	PAGE
Constitution of the United States; Article II, Section 3	7
Fifth Amendment Thereto	2, 3
Administrative Procedure Act, 5 U.S.C. Section 1001 *et seq.*:	
Section 2(e)	6
Section 2(g)	2
Section 4(d)	12
Civil Aeronautics Act, 49 U.S.C. Section 642(a)	5, 8
Communications Act, 49 U.S.C. Section 208	5, 8
Section 303(r)	8
Federal Trade Commission Act, 15 U.S.C. Section 46	10, 11
Federal Reserve Act, Section 25(a)	3, 12, 13
Section 25(b)	3, 13
Investment Companies Act of 1940, 15 U.S.C. Section 80a	12
Judicial Code, 28 U.S.C. Section 1651(a)	14
Labor Management Relations Act of 1947, 29 U.S.C. Section 151 *et seq.*	10
National Stolen Property Act, 18 U.S.C. Section 2311	3
Public Utility Holding Company Act of 1940, 15 U.S.C. Section 79	4
Reorganization Plan #10 of 1950, 64 Stat. 1265	8
Securities Act of 1933; Section 9(a)	3
Section 11(a)	6
Section 19(a)	8
Section 20(a)	5, 7, 8, 11
Securities Exchange Act of 1934, 15 U.S.C. Section 78, Section 4(d)	7
Shipping Act, 46 U.S.C. Section 821	5, 11
Supreme Court: Rule 24(1)	4
Rule 58(2)	14

Cases Cited

	PAGE
Columbia Broadcasting System v. *U. S.*, 316 U. S. 407	5
Corn Products Refining Co. v. *Commissioner of Internal Revenue*, 348 U. S. 911	2
Crooker v. *S.E.C.*, 161 F. 2d 944	6
Far Eastern Conference v. *United States*, 342 U. S. 570	3, 6, 11, 14
FC.C. v. *Allentown Broadcasting Co.*, 349 U. S. 358	4
F.C.C. v *American Broadcasting Co.*, 347 U. S. 284	7, 8
F.C.C. v *R.C.A. Communications, Inc.*, 346 U. S. 86	9
F.P.C. v. *Idaho Power Co.*, 344 U. S. 17	7
F.P.C. v. *Metropolitan Edison Co.*, 304 U. S. 375	10
F.P.C. v. *Oregon*, 349 U. S. 435	3
F.T.C. v. *Minneapolis Honeywell Co.*, 344 U. S. 208	10
General Protective Committee v. *S.E.C.*, 346 U. S. 521	8
Louisiana v. *McAdoo*, 234 U. S. 627	10
Mitchell v. *Vollmer & Co.*, 349 U. S. 427	10
Montana Dakota Co. v. *Public Service Commission*, 341 U. S. 246	6
Philadelphia Co. v. *S.E.C.*, 164 F. 2d 889, 333 U. S. 928	4
Philadelphia Co. v. *S.E.C.*, 175 F. 2nd 808, 337 U. S. 901	2
Phillips Petroleum Co. v. *Wisconsin*, 347 U. S. 672	12
Scripps Howard Radio v. *F.C.C.*, 316 U. S. 4	7
United States v. *American Trucking Association*, 310 U. S. 534	9
United States v. *Menasche*, 348 U. S. 528	9
Whitehouse v. *Illinois Central R. R. Co.*, 349 U. S. 366	3

Supreme Court of the United States

OCTOBER TERM, 1955

No. 106

WILLIAM LEIGHTON,
Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

PETITION FOR THE REHEARING OF THE ORDER OF OCTOBER 10, 1955 DENYING THE ISSUANCE OF A WRIT OF CERTIORARI, AND FOR A STAY OF PROCEEDINGS

Additional Questions Presented

I. Whether Due Process of Law, such as is exclusively prescribed by the Administrative Procedure Act to proceedings before the Commission, has not been denied to petitioner by the Commission's failure (i) to act on a statutory complaint and (ii) to adjudicate an order thereon, and by the failure of the Court of Appeals to review the Commission's "agency action".

II. Whether the Faithful Execution of the Laws does not require the Commission to implement §20(a) of the Securities Act either by general rule or by individual decision, where, by statutory complaint, the doctrine of primary jurisdiction and administrative finality is complied with by the complainant, petitioner here.

III. In view of this Court's impending decision of *Corn Products Refining Co.* v. *Commissioner of Internal Revenue*, 348 U. S. 911, argued October 18, 1955, which will be controlled by the definition of "security", whether it is not of public importance for this Court to decide a justiciable controversy involving the definition of "security" as an "instrument commonly known as a 'security' ", such definition limiting the jurisdictional scope of the Securities Act of 1933, the Securities Exchange Act of 1934, the National Stolen Property Act and that part of the Internal Revenue Code dealing with the taxation of operations involving "securities".

Argument

I. This Court reaches constitutional issues last, not first. For this reason, no constitutional claims were incorporated in the petition for certiorari. The denial of certiorari results in your petitioner being denied **Due Process of Law as guaranteed by the Fifth Amendment to the Constitution of the United States.** Certiorari is not denied from an appellate decision on the merits. It is being denied from an adverse appellate decision on a motion to dismiss for want of jurisdiction.

The Commission's failure to adjudicate an order upon a statutory complaint constitutes denial of Due Process, is not "harmless error" and should not be countenanced by the courts, *Philadelphia Co.* v. *S.E.C.*, 175 F. 2d 808, *vacated as moot* on the joint motion of the parties, 337 U. S. 901.

Denial of appellate review of the Commission's "failure to act" or "denial of agency action", §2(g) of the Procedure Act, doubles this denial of Due Process.

Denial of certiorari on rehearing would amount to an evasion of your petitioner's constitutional right to Due

Process of Law, *i.e.*, to appellate review on the merits of a Commission decision. Your petitioner is being penalized for having instinctively, if unknowingly, adhered to the doctrine of primary jurisdiction and administrative finality so carefully expounded by this Court in *Far Eastern Conference* v. *United States*, 342 U. S. 570. That case was brought to this Court "because there were in issue important questions regarding the relation between the Sherman Law and the Shipping Act", *id.* at 572.

The petition for certiorari also presents, and the instant petition for rehearing hereby reaffirms, that there is here in issue the relation between the jurisdictional scope of the Securities Act of 1933 and the National Stolen Property Act. Further still, there is in issue the relation between the jurisdictional scope of the Securities Act of 1933 and that of the Edge Act, §25(a) of the Federal Reserve Act, 12 U.S.C. §§611-631, and §25(b) of the Federal Reserve Act, 12 U.S.C. §632 (see IV below). Such issues of public importance are not presented solely for your petitioner's benefit. Your petitioner happens to have presented a justiciable controversy involving them. That is attested to by the fact that the amount in controversy (which is not in issue here) is much smaller than the costs of this litigation. For your petitioner the issue is one of principle, not of personal profit.

Denial of certiorari becomes a denial of Due Process of Law when the grounds therefor, which are not apparent from the Court's order, appear to be in conflict with the basis for the grant of the writ in other cases. In several of its recent opinions, this Court has given its reasons for the grant of the writ: "Serious questions concerning the administration of the Railway Labor Act are in issue", *Whitehouse* v. *Illinois Central R. R. Co.*, 349 U. S. 366, 370; "public significance of the issues", *F.P.C.* v. *Oregon*, 349 U. S. 435, 441; "importance of (appellate) decision to

the administration of the (Federal Communications) Act", *F.C.C.* v. *Allentown Broadcasting Co.*, 349 U. S. 358, 360. Identical reasons militate for a grant of the writ in the instant case. But the Court's order seems to have issued after consideration of respondent's untimely Brief in Opposition to the petition for certiorari. For that reason, and without admitting that such brief was receivable under Rule 24(1), respondent's objections to the denial of the writ may be dealt with.

There is *conflict of decisions* within the Court of Appeals as to appellate jurisdiction to review a Commission decision not adjudicated on a record. In *Philadelphia Co.* v. *S.E.C.*, 164 F. 2d 889, *certiorari denied*, 333 U. S. 828, Circuit Judges STEPHENS, CLARK and WILBUR K. MILLER, were presented with the Commission's motion to dismiss, for lack of jurisdiction, Philadelphia's petition to review a Commission "order". The essentials of that case correspond to the case at bar: the Commission asserted that it had "discretion" to revoke an exemption under the Public Utility Holding Company Act of 1935 otherwise than by order made upon a record developed in public hearings. It reserved this position by certifying as the "record" in the case the "public file" which it had maintained in connection with its revocation of Philadelphia's exemption. The learned judges denied the motion, holding that Philadelphia had complied with the doctrine of primary jurisdiction and administrative finality. After certiorari was denied by this Court, the same judges could not avoid reaching constitutional questions in refusing to review on the merits the Commission's revocation of Philadelphia's exemption on the ground that such decision had been reached in violation of Due Process of Law, *Philadelphia Co.* v. *S.E.C.*, 175 F. 2d 808, on joint motion of the parties, *vacated as moot*, 337 U. S. 901.

In the case at bar, Circuit Judges EDGERTON, BAZELON and FAHY, dismissed upon motion for lack of jurisdiction, a petition for appellate review of a Commission "order" or "rule". "The particular label placed upon (its action) by the Commission is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive", *Columbia Broadcasting System* v. *U. S.*, 316 U. S. 407, 416.

Here too, the Commission contended that it had "discretion" to enter its disposition of a statutory complaint without adjudicating an "order" on the basis of a "record". Therefore, its argument continues, there being no "record", no reviewable "order" exists. The learned judges tacitly disagreed with their brethren within the Circuit and granted the motion. They formulated a new concept of judically reviewable "orders" under §9(a) of the Securities Act, some that are deemed to be reviewable, and others which are not, presumably "discretionary" orders. Their error is basically simple: (i) §9(a) subjects all Commission "orders" to exclusive appellate review upon the petition of any aggrieved person, hence no such orders are exempt from such review; (ii) even if an "order" were discretionary under §20(a) as dispositive of a complaint, such "order" is not exempt from appellate review by reason of §10 of the Procedure Act because the Securities Act does not preclude judicial review. The only "agency action committed by law to agency discretion" is the Commission's power to decide upon an investigation, not its duty to entertain a statutory complaint. As much is apparent from §22 of the Shipping Act, 46 U.S.C. §821, §208 of the Communications Act, 47 U.S.C. §208, §1002 of the Civil Aeronautics Act, 49 U.S.C. §642(a).

§20(a) of the Securities Act, in issue here, has the same purpose as these other statutes, that is, to confer upon the

Commission the duty to entertain complaints alleging violations of the Act and, subsequent to the adjudication of orders dispositive of such complaints, to confer discretion upon the Commission whether to investigate the matters complained of.

This doctrine of primary jurisdiction and administrative finality has been carefully expounded in *Far Eastern Conference, supra,* In view of the Court of Appeals' hypothetical opinion, a denial of certiorari would cast considerable doubt as to the applicability of the doctrine to proceedings before the Commission, the latter having committed the type of error recognized by this Court in *Montana Dakota Co.* v. *Public Service Commission,* 341 U. S. 246, 249: "As frequently happens where jurisdiction depends on the subject matter, the question whether jurisdiction exists has been confused with the question whether the complaint states a cause of action".

The Commission has exclusive primary jurisdiction, upon a §20(a) complaint, to decide whether the alleged violations of the statute have been committed. In this respect, the Commission's decision must be correct as a matter of law before it may proceed to the discretionary stage whether to institute an investigation. Reliance upon *Crooker* v. *S.E.C.,* 161 F. 2d 944 (1947), not decided on the basis of the Procedure Act, is misleading. There, the Commission's power to accelerate the effectiveness of a registration statement was in dispute. The Commission had complied with the doctrine of primary jurisdiction and administrative finality by granting the Federal license (*i.e.* accelerating the effectiveness of the registration statement, a "license" under §2(e) of the Procedure Act). The security holder had a cause of action under §11(a) to challenge the terms of that license.

In the case at bar, the issuer sells his securities through the mails and through the use of the instrumentalities of

interstate commerce *without* a Federal license. Therefore, the security holder, *i.e.* your petitioner, cannot assert a cause of action against him. The paradox appears that whereas an issuer in compliance with the Act's licensing requirement is amenable to suit by the security holder, an issuer in violation of such requirement escapes amenability to suit. Violations of the Act may be complained of by means of a §20(a) complaint. Such complaint invokes and complies with the doctrine of primary jurisdiction and administrative finality. Where, as here, the Commission denies the applicability of this doctrine to proceedings before it, appellate review is the corrective remedy: "Generally, judicial review of administrative orders is limited to determining whether errors of law have been committed and the court of review exhausts its power when it lays bare a misconception of law and compels correction", *Scripps Howard Radio* v. *F.C.C.*, 316 U. S. 4, 10, *F.P.C.* v. *Idaho Power Co.*, 344 U. S. 17, 20.

II. Article II, §3 of the Constitution of the United States includes among the President's duties: "**He shall take care that the laws be faithfully executed**". However, pursuant to §4(d) of the Securities Exchange Act of 1934, 15 U.S.C. §78d(a), Congress established the Commission and provided for the President to appoint its members by and with the advice and consent of the Senate. Therefore, the duty of "faithfully executing" the securities laws devolves upon the Commission, under the President's overall "care".

"Faithful execution of the laws" means "implementing the statute either by general rule or by individual decisions", *F.C.C.* v. *American Broadcasting Co.*", 347 U. S. 284, 289, otherwise "the Commission would we remiss in its duties if it failed to exercise its licensing authority" for that purpose, *id.*

It gives your petitioner no pleasure to state that the Commission is remiss in its duties because it has failed to implement §20(a) either by General Rule or by an individual decision reached by the full Commission. As a result of the decision of its then Assistant Director, Division of Corporation Finance and with respect to the scope of its duties, the Commission has confined itself to a bondage of error from which only this Court can extricate it. The statutory mandate to the Commission for the "faithful execution of the laws" is §19(a) of the Securities Act, the counterpart of §303(r) of the Communications Act, cited by this Court in support of its opinion in *American Broadcasting Co., supra.* But §20(a) is not a model of draftsmanship, hence the Commission had the choice of three statutory patterns for the formulation of a Rule thereunder, §22 of the Shipping Act, §208 of the Communications Act and §1002 of the Aeronautics Act. "The relation of remedy to policy is peculiarly for the administrative agency", *General Protective Committee* v. *S.E.C.*, 346 U. S. 521, 534.

In the final analysis, the constitutional requirement of "faithful execution of the laws" is alleged to have been satisfied by the Commission's then Assistant Director, who signed the decision of July 8, 1954 on behalf of the Commission and by virtue of its own regulations. Your petitioner challenges this procedure as not meeting the constitutional requirement, since the Assistant Director is not appointed by and with the advice and consent of the Senate and he does not statutorily act for the Commission. By virtue of Reorganization Plan #10 of 1950, 64 Stat. 1265, only the Commission's Chairman may perform its executive and administrative, but not adjudicatory, functions. "Since the Commission professed to dispose of the case merely upon its view of a principle which it derived from the statute and did not base its conclusion on matters

within its own special competence, it is for (this Court) to determine what the governing principle is", *F.C.C.* v. *R.C.A. Communications, Inc.*, 346 U. S. 86, 91. "Faithful execution" of the securities laws requires the Commission to correctly define the meaning of "security" so as not to evade the jurisdictional scope of the Securities Act.

"The interpretation of the meaning of statutes as applied to justiciable controversies is *exclusively* a judicial function. This duty requires one body of public servants, the judges, to construe the meaning what another body, the legislators, said", *U.S.* v. *American Trucking Association*, 310 U. S. 534, 544. The Court of Appeals trespassed against these basic principles of appellate review, including those of *Scripps Howard Radio, supra,* and left standing, for alleged want of jurisdiction, a Commission decision which emasculates the meaning of an entire subsection of the Securities Act. "The cardinal principle of statutory interpretation is to save, not to destroy * * * It is our duty to give effect, if possible, to *every clause and word* of a statute, rather than emasculate an entire section as the Government's interpretation requires", *U. S.* v. *Menasche*, 348 U. S. 528, 538. If the Court of Appeals' ambiguous and hypothetical decision is left standing, the faithful execution of the securities laws will become a matter for the caprice and arbitrariness of the Commission's Assistant Directors. The violators of the securities laws will feel safe because under the Commission's practice no complaints need be entertained by it and no judicial review can be had of its failure to act. If such violators operate from a judicial district where it takes from 19 to 54 months to bring a civil action to trial (assuming that it is possible to assert a cause of action under the Act), they can feel safe from the effects of delayed justice. The plaintiffs' right to substantive justice will be defeated by the defendants' right to procedural justice. In such circumstances, the "faithful execution of the laws" becomes a myth.

III. Since the Court's order of October 10, 1955 does not note the untimely filing of the Commission's Brief in Opposition to the petition for certiorari, it must be assumed that the Court considered such brief over your petitioner's timely objection to its admissibility. The rule is settled that Federal agencies must comply with this Court's rules just as any other litigant, *F.T.C.* v. *Minneapolis Honeywell Co.*, 344 U. S. 208. In the case at bar, the Commission acknowledged receipt of the petition for certiorari on May 11, 1955. Its Brief in Opposition was not filed until forty days later, on June 20, 1955. Therefore, such brief was not properly before the Court and was improvidently considered by it.

Nevertheless, because of such apparent consideration, it is necessary to deal with the Commission's position. Since the Administrative Procedure Act of June 11, 1946 is applicable to proceedings before the Commission and is mutually complementary with the Securities Act, cases decided prior to its enactment no longer control a case decided under its provisions. The case at bar is of post-Procedure Act "vintage", *Mitchell* v. *Vollmer & Co.*, 349 U. S. 427, 429. It cannot be controlled by cases of pre-Procedure Act vintage such as *Louisiana* v. *McAdoo*, 234 U. S. 627 (1914) and *F.P.C.* v. *Metropolitan Edison Co.*, 304 U. S. 375 (1938), which obviously do not incorporate the philosophy of that Act. The only cases of post-Procedure Act vintage mentioned by the Commission are those under the Labor Management Relations Act of 1947, 29 U.S.C. §151ff. Under Labor Act procedure, a *complaint* may be issued by the Board, its agent or agency, for consideration and investigation by the Board itself. The Board is the complainant and the same Board issues its *order* dispositive of the complaint. The Court is respectfully urged to take judicial notice of the fact that under this procedure, as well as under the Federal Trade

COPY BOUND

Commission Act, 15 U.S.C. §46, *complaints* are issued by the administrative agency and disposed of by *order*, which are judicially reviewable.

On the other hand, §20(a) of the Securities Act provides for "such person" as has acquired any security to file a complaint with the Commission alleging violations of the Act. The statute must be interpreted by reference to §22 of the Shipping Act, so carefully expounded in *Far Eastern Conference, supra.*

Ironically, the purpose attributed by the Commission to the statute, *i.e.* the regulation of "investment" securities, is a test fully met by the issuer here, assuming, *arguendo*, that the Act's preamble does not exclusively state its purposes. The issuer's purpose in gathering the public's money deposits through the sale of travelers checks in interstate commerce is to create a revolving fund for use as an investment medium. In recent years, 92% of such investments are represented by the counterpart of outstanding travelers checks and letters of credit (both having a maturity at the time of their issuance of more than nine months), as shown by the following figures from the issuer's balance sheets.

r ending ember 31	Total assets or liabilities	Liability for travelers checks and letters of credit sold	Investments	Percentage investments to travelers checks liability
1.....	$252,701,865	$211,424,112	$186,941,130	83
2.....	279,569,518	236,850,134	218,295,464	92
3.....	288,750,545	246,492,781	227,308,961	92
4.....	303,023,634	259,636,599	240,075,390	92

Thus, the issuer's tremendous national advertising campaign is aimed at securing enough funds from the Peters in order to pay off the Pauls. As shown by the "growth" of the outstanding amount of travelers checks, the Pauls are somewhat slow in claiming their

ND CLOSE IN CENTER

interest-free and uninsured deposits. Therefore, the issuer is free to "invest" their money, although not under the Commission's supervision pursuant to the Investment Company Act of 1940, 15 U.S.C. §80a. Yet experienced (and fully supervised) institutional investors can make serious errors of judgment resulting in a money loss to the institution concerned. The following figures reflect the errors of judgment of two of the country's most experienced institutional investors, both members of the Federal Reserve System and of the Federal Deposit Insurance Corporation (the issuer here complained of is a member of neither).

	Profit (Cr.) or Loss (Dr.) from security transactions first nine months of year	
	1954	1955
First National City Bank of New York	$7,845,561 Cr.	$1,515,384 Dr.
The Chase Manhattan Bank	7,502,000 Cr.	1,007,000 Dr.

The Commission's error in not setting up a "record" to include these facts otherwise publicly known is leading it into further error as to its responsibilities under the Investment Companies Act of 1940. Such errors should be corrected by this Court on certiorari or by the Court of Appeals on remand, since "consistent error is still error", *Phillips Petroleum Company* v. *Wisconsin*, 347 U. S. 672, 678, Note 5.

IV. Since September 6, 1955, a petition for the issuance of a Rule under §25(a) of the Federal Reserve Act, pursuant to §4(d) of the Administrative Procedure Act, has been brought by your petitioner before the Board of Governors of the Federal Reserve System. The Board's preliminary interpretation of that statute, issued September 27, 1955, appears to be that corporations engaging, or

wishing to engage, in the foreign banking business, may optionally in their discretion seek the Board's permit for that purpose. This absolves such corporations from (i) the organization or conversion requirement of that Act, (ii) the requirement of seeking the Board's specific consent for the gathering of money deposits within the United States, *i.e.* their sales of travelers checks, and (iii) their amenability to suit in a Federal court "notwithstanding any other provision of law" under §25(b), as to transactions arising out of their foreign banking business.

Once more, the failure of an administrative agency to exercise its licensing authority for the purpose of implementing a statute committed to its administration deprives your petitioner of a cause of action for the recovery of his property and also deprives Federal district courts of their *original* jurisdiction under §25(b), American Express Company, an institution extensively engaged in the foreign banking business, having ignored the requirement of securing a Federal license for that purpose.

Were the Board to adopt the draft Rule submitted as part of the statutory petition, the case at bar would become moot, since such Rule would license the issuer only upon condition of its being exempt under the Securities Act and under the Investment Companies Act, and upon the further condition that it assume liability for all its unpaid obligations. For this reason, it is hereby prayed that a stay of proceedings be granted pending decision by the Board.

Were the Board to deny the relief sought, the Board's "agency action" would be subject to judicial review, since §25(a) neither precludes such review nor commits to "agency discretion" the licensing requirement. No exclusive appellate review of the Board's forthcoming "agency action" is prescribed by any statute known to your petitioner. Therefore, this Court may be petitioned for the

issuance of a writ under 28 U.S.C. §1651(a), (the jurisdictional basis for the decision in *Far Eastern Conference, supra*), since the matter is one of public importance and the doctrine of primary jurisdiction and administrative finality has been complied with by your petitioner.

Should an extraordinary writ be granted, the two cases should be consolidated for argument, since they are closely interrelated.

It is hereby certified that this petition conforms to the requirements of Rule 58(2).

Respectfully submitted,

WILLIAM LEIGHTON,
Petitioner *pro se.*